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AUG 30 2004

Federal Communication Commission
Bureau / Office

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments, FM Broadcast Stations)
(Levan and Richfield, Utah)

MB Docket No. 04-258
RM-11000

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Federal Communications Commission
Office of the Secretary

To: Assistant Chief, Audio Division

**Opposition and Request for Expedious Rescission
of Notice of Proposed Rulemaking and Order to Show Cause**

Mid-Utah Radio, Inc., by its undersigned counsel, hereby responds to the directive contained in the Notice of Proposed Rulemaking and Order to Show Cause ("NPRM") released July 20, 2004, in the above-referenced proceeding, to file no later than the date hereof, a written statement showing with particularity why its construction permit for Station KCYQ should not be modified as proposed in the NPRM.

1. Mid-Utah opposes the proposal to modify the KCYQ construction permit for operation on Channel 244C for the reasons stated in the attached Engineering Statement prepared by consulting engineer, Kevin Terry, which is incorporated by reference herein. Indeed, Mid-Utah urges the Assistant Chief of the Audio Division to rescind the NPRM because the underlying Petition for Rulemaking ("Petition") filed by Micro Communications, Inc. ("Micro") contained fatal defects which apparently were not noticed during the staff's review of the Petition.

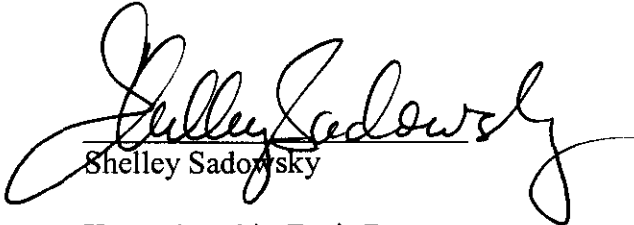
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2. As Mr. Terry's Engineering Statement demonstrates, Micro failed to make the requisite showing that KCYQ could operate from its currently licensed site on

Channel 244C in accordance with the Commission's minimum spacing requirements. That failure was no accidental omission because, as Mr. Terry demonstrates, KCYQ would be short-spaced to both a vacant allotment on Channel 246A at Beaver, Utah, and a vacant allotment on Channel 244C at Mesquite, Nevada, if it had to operate on Channel 244C at its licensed site.

3. Consistent with long-held precedent cited in Mr. Terry's Statement, Micro's Petition should have been dismissed because of the short-spacing that would exist for KCYQ's operations on Channel 244C at its licensed site. Accordingly, since the NPRM was issued in error, the Audio Division is urged to expeditiously rescind the NPRM in advance of the date that comments are due herein (September 13, 2004). Otherwise, if this proceeding is permitted to continue as proposed, the Commission would be violating its own policies and resources of would-be interested parties and the Commission, itself, would surely be wasted.^{1/}

Respectfully submitted,



Shelley Sadowsky

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Counsel for Mid-Utah Radio, Inc.

Dated: August 30, 2004

^{1/} Should the Audio Division not act to immediately rescind the NPRM before comments are due herein, then, at a minimum, in fairness to all would-be interested parties, the dates for filing comments and reply comments should be immediately postponed pending resolution of the matters raised herein.

ENGINEERING STATEMENT
IN OPPOSITION TO
NOTICE OF PROPOSED RULE MAKING
AND ORDER TO SHOW CAUSE

MB DOCKET 04-258
RM 1100

Mid-Utah Radio, Inc.
KCYQ (FM) 229C Richfield, UT

Prepared by:

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August 19, 2004

ENGINEERING STATEMENT
IN OPPOSITION TO THE
NOTICE OF PROPOSED RULE MAKING
AND ORDER TO SHOW CAUSE
MB DOCKET 04-258
RM 1100

Mid-Utah Radio, Inc.
KCYQ (FM) 229C Richfield, UT

General:

I have been retained by Mid-Utah Radio, Inc. ("Mid-Utah"), licensee of radio station KCYQ (FM) Richfield, UT, to prepare the engineering portion of its Opposition to the Notice of Proposed Rule Making and Order to Show Cause in MB Docket 04-258, RM 1100.

In the original Petition for Rule Making in this proceeding, Micro Communications, Inc. ("Micro"), licensee of radio station KCFM (FM) Levan, UT, proposes to change its channel from 244C to 229C and move its site to coordinates 39-50-53.7 NL, 111-19-51.4 WL. In order for KCFM to affect such a change in channel, radio station KCYQ must vacate channel 229C in order for KCFM and KCYQ to be fully spaced pursuant to Section 73.207 requirements. Micro proposes that KCYQ use the substitute channel of 244C in place of 229C at both its currently licensed site and its recently permitted site proposed in BPH-20030304AAQ.

Substitute Channel Not Fully Spaced at Licensed Site:

In its Petition, Micro's counsel asserts that the Engineering Statement prepared by David C. Schaberg and submitted therewith demonstrates that "the relief requested [therein] will meet all applicable FCC requirements with respect to city coverage and channel spacing. Specifically, the changes proposed [therein] will enable KCYQ to continue operation from its currently-licensed site, and will further permit KCYQ to construct and operate the facility proposed in BPH-20030304AAQ from the site proposed therein." In reality, Micro's Engineering Statement makes no such representations with respect to KCYQ being able to continue operation from its currently licensed site on the substitute channel, 244C. In fact, the Engineering Statement does not address spectrum spacings on channel 244C at the Licensed KCYQ site in any way.

Engineering Exhibit 1, included as part of the instant Engineering Statement, is a Channel Study of Channel 244C at the currently licensed KCYQ site. As can be seen in the Channel Study, Channel 244C at the currently licensed KCYQ site is short spaced, pursuant to Section 73.207 requirements, to Vacant Allotment 246A at Beaver, UT, by 36.31 kilometers. Also, it is short spaced to Vacant Allotment 244C at Mesquite, NV by 32.75 kilometers.

Conclusion:

Commission policy requires that any station being ordered to change channel as part of an Order to Show Cause must be able to change to an equivalent, fully spaced channel at its authorized site(s). If the station being so ordered only has a licensed site, it must only be able to change to the substitute channel at the licensed site. If the station being so ordered also has a Construction Permit, this authorization must also be protected in addition to the licensed site. This is the case for KCYQ. At the time that Micro filed its Petition, KCYQ had two authorizations - a Construction Permit and a License. In this case, Commission policy would require a substitute channel to be of equivalent class and fully spaced at both sites. Clearly, Micro has not offered a substitute channel that works at both sites. The equivalent class channel 244C is fully spaced at only the Construction Permit Site.

The Commission has repeatedly ruled that rule making proposals and counterproposals to amend the FM Table of Allotments must be "technically correct and substantially complete" at the time they are filed.¹ The Commission will not accept rule making proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit² or are dependent upon final action in another rulemaking proceeding.³ The rationale for this policy is that processing contingent proposals is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the staff.⁴ The staff would either have to wait until the contingency is met, thereby further delaying action in a case, or would have to revisit a decision if a proposal was granted contingent on the outcome of an action that never occurred. In either case, the staff's attempts at processing cases and achieving finality is frustrated.

Since the substitute channel offered by Micro is not fully spaced to all other allotments and authorizations at the KCYQ licensed site, and it is Commission policy to reject rule making proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit, it is the undersigned's opinion that Micro's proposal should be dismissed as fatally defective.

Respectfully Submitted,



Kevin Terry, Consulting Engineer

¹ See *Broken Arrow and Bixby, Oklahoma*, et al., 3 FCC Rcd 6507 (1988), recon. denied, 4 FCC Rcd 6981 (1989); *Fort Bragg, California*, 6 FCC Rcd 6817 (1991); *Provincetown et al.*, Massachusetts, 8 FCC Rcd 19 (1992); and *Sanford and Robbins, North Carolina*, 12 FCC Rcd 1 (1997).

² See *Cut and Shoot, Texas*, 1 FCC Rcd 16383 (Policy and Rules Div. 1996) (dismissal of a rulemaking petition that was fully spaced to an outstanding construction permit of another station but was short-spaced to the licensed site of the station affirmed because the proposal violated Section 73.208(a) and was contingent on the building and licensing of the facilities set forth in the construction permit).

³ See, e.g., *Esperanza, Puerto Rico*, *Christiansted, Virgin Islands*, 11 FCC Rcd 2908 (Policy and Rules Div. 1996) (dismissal of a rulemaking petition affirmed because the request was contingent on the outcome of another proceeding that was not final due to the pendency of a petition for reconsideration); *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615, 617 n.3 (1988), recon., 3 FCC Rcd 6626 (1988); and *Frederiksted, Virgin Islands and Culebra and Carolina, Puerto Rico*, 10 FCC Rcd 13627 (Allocations Br. 1995).

⁴ See *Cut and Shoot, Texas*, 11 FCC Rcd at 16384

Channel 244C Channel Study
 KCYQ Richfield, UT, Licensed Site

REFERENCE

38 32 30 N
 112 03 31 W

CLASS = C

Current Spacings

DISPLAY DATES

DATA 08-19-04

SEARCH 08-19-04

----- Channel 244 - 96.7 MHz -----

Call	Channel	Location	Dist	Azi	FCC	Margin
RADD	ADD	244C Richfield	UT 90.11	16.0	290.0	-199.89
RDEL	DEL	244C Levan	UT 102.75	30.5	290.0	-187.25
KCFM	LIC	244C Levan	UT 102.75	30.5	290.0	-187.25
AL244	RSV	244C1 Levan	UT 115.43	11.8	270.0	-154.57
RDEL	DEL	246A Beaver	UT 58.69	240.0	95.0	-36.31
AL246	VAC	246A Beaver	UT 58.69	240.0	95.0	-36.31
ALLO	VAC	244C Mesquite	NV 257.25	223.8	290.0	-32.75

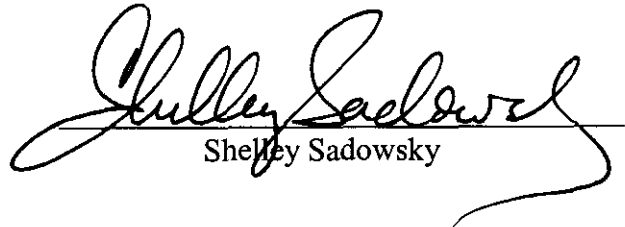
CERTIFICATE OF SERVICE

I, Shelley Sadowsky, hereby certify that on this 30th day of August, 2004, a copy of the foregoing **Opposition and Request for Expeditious Rescission of Notice of Proposed Rulemaking and Order to Show Cause** was sent via hand delivery and e-mail or first class mail and e-mail, as indicated below, to the following:

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